

In the Supreme Court of the Hawaiian Islands. In Equity. In Chambers.

HOP SING COMPANY VS. KAM ON AND JOHN S. MCGREW.

BEFORE PRESTON J.

Decision.

The complainants, Ating, (otherwise known as Atini and Akini,) Alang and Ho Look, copartners under the name, style and firm of Hop Sing Company, allege that on the 16th of August, 1881, the defendant, McGrew, demised to the complainant, Ating, certain rice lands and fishing rights at Kalawao, in the District of Ewa, for a term of six years. That on the 13th of August, 1883, the complainant Ating, assigned said lease and premises to the defendant, Kam On, who is still in occupation as servant to the defendant, McGrew. That on the eleventh October, 1883, the defendant, Kam On, assigned the said leasehold premises, (with other property, by way of mortgage,) to one Ho Yeng to secure certain sums theretofore advanced by said Ho Yeng to the defendant, Kam On, as well as to secure to the said Ho Yeng and his assigns, the handling and control of the crops of rice raised by said defendant, Kam On, on the lands comprised in the mortgage. This deed was recorded on the 29th day of October, 1883. That Kam On made default in payment of the moneys secured by said mortgage and that said indebtedness is still unpaid. That on 7th August, 1886, said Ho Yeng conveyed to the complainants all his rights and interest in, to and under said mortgage. That said premises comprised in the lease to Ating, are occupied by Kam On, under and by authority of said McGrew, under the pretense by McGrew, that said lease had become forfeited by non-payment of the rent thereby stipulated. That complainants have demanded from the defendant, possession of the said premises, but the defendant refuses to surrender same. That defendant, McGrew, asserts that the sum of two hundred and thirty dollars is due to him for rent of said premises for the period prior to August 16th, last past, but complainants deny such to be the fact and aver a tender of the amount due on 16th August, for the ensuing half year. That said Ho Yeng, under terms of said mortgage, received and sold the crops of rice grown on the lands comprised in said mortgage and made advances to said Kam On, and that at the date of the assignment of said mortgage there was due to said Ho Yeng \$364.47.

The bill prays that an account be taken of the rent due, and upon payment thereof, the complainants be decreed to have possession of the premises. Or that an account be taken of what is due in respect of said mortgage, and that on default in payment the premises may be sold and the usual order in foreclosure suits and for general relief.

The defendant, Kam On, failed to answer, and the bill was taken *pro confesso* as against him.

The defendant, McGrew, by his answer, admits the making of the lease and the assignment of the mortgage to the complainants, but denies, and puts complainants upon the proof of all the other allegations in the bill.

At the hearing the following documentary evidence was introduced by the complainants:

Lease, J. S. McGrew to Ating. (Exhibit "A.")

Assignment of same to Kam On. (Exhibit "D.")

Assignment of partnership interest, Ho Hang to Kam On. (Exhibit "G.")

Mortgage, Kam On to Ho Yeng. (Exhibit "B.")

Transfer of mortgage, Ho Yeng to complainants. (Exhibit "E.")

The following is a translation of the mortgage.

"I Kam Ona, (ch) of Kalawao, Ewa, Island of Oahu, bind over (or mortgage) all my leased lands described in an instrument executed Dec. 4, '82, and also in an instrument executed Aug. 13, '83, together with all the houses, pigs, chickens, ducks, horses, cattle and rice now growing upon said leased lands; also all the leases and deeds (before) in possession of Ho Yeng by way of mortgage as security that I pay him what I owe him, to wit the sum of \$1,000, for the period of one year from Oct. 11, '83, to Oct. 10, '84, with interest one per cent per month. And I bind myself to pay said principal of \$1,000, with the interest, \$120, out of all the rice on said lands, that is, out of all the present rice crop now growing, which is under mortgage, also that I deliver said rice to Ho Yeng till the end of the year above mentioned, without selling the same to any one else until my debt to Ho Yeng shall have been paid. In case that I sell the rice to any one else, Ho Yeng, his heirs and assigns are hereby authorized, according to law, to seize upon the rice wrongfully disposed of by me in contravention of the provisions of this instrument. Further, if at the end of the period of this mortgage deed, my debt shall not have been satisfied, said Ho Yeng is hereby authorized to dispose of the remaining terms of lease, as well as all other property enumerated in said instrument in satisfaction of my said debt to him. Provided that if I truly pay the same in the specified time, this instrument shall be void and become of no effect."

Ho Yeng, professing to act under the terms of this mortgage, advanced to the mortgagor, from time to time, until the 15th July, 1886, sums of money, and received and sold the crops of rice grown on the mortgaged premises, and claimed that on the date of the transfer of the mortgage by him to the complainants, the sum of \$926.44 was due on account thereof.

The defendant, McGrew, introduced in evidence a lease, dated the 24th March, 1885, whereby he demised to the defendant, Kam On, the premises comprised in the former lease for a

term of six years from the 16th day of August, 1887, [the date of the expiration of such former lease.]

On this lease this deed is endorsed. "Know all men by these presents that the foregoing indenture of lease made by and between John S. McGrew of the one part and Kam On of the other part, and the term therein granted is hereby cancelled and made void for non-payment of rent, and possession is hereby restored to the lessor, without prejudice, however, against any collection by distress or otherwise, of all rents now unpaid and owing from the within named Kam On to said John S. McGrew by virtue of, and under the lease of and term in the same premises granted to Ating, dated August 16th, 1881, and by said Ating assigned to the said Kam On and the last mentioned lease; and the terms thereby granted are for the same reasons and consideration hereby cancelled and made void. In witness whereof the said parties have hereto set their hands and seals this, 12th day of July, A.D., 1886."

KAM ON. (Seal.)
JOHN S. MCGREW. (Seal.)
Acknowledged before W. A. Whit-
ing, July 12, 1886.

The defendant, McGrew, claimed that by virtue of this last mentioned deed, he was entitled to the possession of the demised premises against the complainants, either as a purchaser for value, without notice of the mortgage or as landlord having entered for a forfeiture, by non-payment of rent. He also claimed that the complainants ought not as against him recover any moneys advanced professionally, under the mortgage, after the expiration of the one year mentioned therein, and that all moneys thereafter received by Ho Yeng from the sale of rice on account of Kam On should be in reduction of the mortgage debt.

I am of opinion that the mortgage having been duly recorded, the defendant, McGrew, must be held to have had notice thereof.

I am also of opinion that that the so-called surrender of the 12th day of July, 1886, is an assignment of the defendant, Kam On's equity of redemption in the lands comprised in the lease, and consequently that the defendant, McGrew, holds the same subject to the mortgage; and that the crop harvested since the commencement of this suit, and the subject of the interlocutory injunction granted herein, is also subject to the mortgage.

I am also of opinion that the mortgage does not cover advances made subsequent to the 1st day of October, 1884, but that the defendant, McGrew, is not entitled to have the amounts received by Ho Yeng subsequent to that date, from the sales of rice, applied in satisfaction of the mortgage debt.

Being therefore, of opinion that the defendant, McGrew, cannot be considered to be in possession under the alleged forfeiture for non-payment of rent, the question as to whether a sufficient tender of, or offer to pay the amount alleged to be due, does not arise.

I therefore, find that the complainants are entitled to relief under their bill, and order and adjudge as follows:

That an account be taken of what was due to Ho Yeng on account of principal and interest accrued by virtue of the said mortgage, on the 1st day of October, 1884, and that the said defendant, Kam On, be decreed to pay the same to the complainants with interest thereon at the rate of nine per cent per annum, up to the time of taking such account, and that the said Kam On do pay the amount found to be due, within seven days from the date of the confirmation of the master's report, and in default of such payment, the right or equity of redemption of all parties in the premises comprised in said mortgage be forever barred, and the said property, including the crop harvested, be sold at public auction, and the proceeds be applied in and towards satisfaction of the amount so found to be due, provided that if sufficient to pay the said amount be realized from the sale of the mortgaged property not comprised in the lease from the defendant, McGrew, of the 16th August, 1881, to satisfy the said amount, the property comprised in the said lease, and the said crop, and the proceeds thereof shall be discharged from the said mortgage and from all claims thereunder.

I reserve further direction and costs, parties to be at liberty to apply as they may be advised.

Ashford & Ashford and W. A. Kinney for plaintiffs; Paul Neumann and F. M. Hatch for defendants.

Honolulu, January 18, 1887.

Supreme Court of the Hawaiian Islands.—In Banco. April Term, 1887.

HOP SING VS. KAM ON AND J. S. MCGREW.

JUDG C. J., M'CULLY, PRESTON AND BICKERTON JJ. FORNANDER J. ABSENT.

Opinion of the Court per JUDG C. J.

Having heard the arguments of counsel and examined the pleadings in the case, we are of opinion that the opinion of Mr. Justice Preston, rendered on the 18th January, 1887, appealed from, should be sustained and we hereby adopt and affirm the same.

In addition we wish to say that Ating, the original lessee of Dr. McGrew, having assigned the lease to Kam On, and Kam On having mortgaged the term to Ho Yeng, and Ho Yeng having assigned the mortgage debt and security to Hop Sing (the plaintiff) the term is still outstanding, the lease not having expired, and Hop Sing is entitled to have his mortgage foreclosed.

The so-called "surrender" taken by Dr. McGrew from Kam On, on the 12th July, 1886, cannot be held to be a surrender of the leasehold, or a forfeiture of the lease for the non-payment of rent.

Kam On had assigned the lease of 1881, by way of mortgage.

His only remaining interest in it, therefore, was the equity of redemption. This was all, if anything, that passed to McGrew, by the instrument of July 12, 1886, for this was all Kam On had.

The lessee's interest in the lease was then held by Hop Sing.

There was no merger of the term with the freehold in McGrew, for there was an equity intervening—the mortgage held by Hop Sing.

McGrew having taken possession, there is no rent accruing to him thereafter, for the lessor cannot have his land and rent for it as well.

But as to any arrears of rent, prior to the taking possession by McGrew, this should be paid by the mortgagee, who as the assignee of the lessee would be liable for it.

For if a mortgagee has had the lease assigned to him as a security merely, he is held to be seized of the legal estate, and is liable, as assignee, whether in possession or not. Taylor's Landlord and Tenant Sec. 455 and cases cited.

But as we understand the evidence, Dr. McGrew has taken notes from Kam On for the rent accruing prior to his taking possession. This would preclude him from claiming it from the mortgagee.

Decree affirmed.

Ashford & Ashford for plaintiff; F. M. Hatch and P. Neumann for defendant.

Honolulu, April 22, 1887.

Subsequently to the filing of the foregoing decision on motion for a rehearing on the part of the defendant McGrew, was heard, the decision on which was published in the GAZETTE of 28th day of June last.

In the Supreme Court of the Hawaiian Islands.—In Banco. July Term, 1887.

HOP SING CO. VS. KAM ON AND J. S. MCGREW.

JUDG C. J., M'CULLY, J., PRESTON, J., BICKERTON, J., (FORNANDER, J. ABSENT.)

Opinion of the Court by BICKERTON J.

This matter comes here on exceptions by defendants, to master's report, as follows:

Said defendant excepts to the allowance of the amount of \$2,509.10 principal, as within the security of the mortgage, for the reason that the mortgage as written, is security for the sum of one thousand dollars only, and does not cover advances to be made in the future, beyond that amount.

Said defendant claims that the master's account of advances should stop at December 30, 1883, with \$1,000. That there should be deducted the credit of \$738.40 on December 29, 1883, and that the balance, \$261.60, with interest, should be found to be the amount due under the mortgage.

Having heard the arguments of counsel, and examined the master's report, the pleadings and proofs in the case, we are of opinion that the exceptions should be sustained.

We are of opinion that the mortgage is security for the sum of one thousand dollars only, and does not cover advances to be made in the future beyond that amount. We therefore allow the sum of \$1,000, and interest \$120, less the credit of Dec. 29, 1883, of \$738.40, and interest \$69.16, leaving a balance of \$312.44, with interest at nine per cent per annum from 10th October, 1884, which we find to be the amount due on the said mortgage.

The master's report is modified accordingly.

Ashford & Ashford for plaintiff; F. M. Hatch for defendant, McGrew.

Honolulu, August 26, 1887.

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